UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CENTRO PRESENTE, et al.,

Plaintiffs,

V.

DONALD J. TRUMP, et al.,

Defendants.

_____

Civil Action
No. 18-10340-DJC

April 23, 2019
2:59 p.m.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on April 23, 2019.)

THE CLERK: Civil action 18-10340, Centro Presente v. Trump.

Would counsel please state your name for the record.

MR. PEREZ-ALBUERNE: Carlos Perez for the plaintiffs.

THE COURT: Good afternoon.

MS. ERCOLANO: Allison Ercolano for the plaintiffs.

THE COURT: Good afternoon.

MR. MARANDETT: Eric Marandett for the plaintiffs.

MS. ROY: Anna Roy for the plaintiffs.

MR. NIMNI: Oren Nimni for the plaintiffs.

THE COURT: Good afternoon to you all.

MR. KIRSCHNER: Adam Kirschner for the defendants.

THE COURT: Good afternoon.

MR. FARQUHAR: Good afternoon, your Honor. Ray Farquhar for the defendants.

THE COURT: Good afternoon.

Counsel, I know we're here on the plaintiffs' motion to compel. I've had a chance to review the motion papers, opposition, and reply.

Counsel, I'm prepared to hear argument. Just to let you know what I'm focused on, I'm certainly prepared to hear you on the substance, I also wanted to hear you on the timing of continued discovery. I know that I had signed off on a motion to stay depositions. I understand that there is a motion to stay in regards to this and other related cases based on the Ramos appeal pending. So I'd like to hear from you both on the substance and timing from both perspectives.

Counsel?

MR. PEREZ-ALBUERNE: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. PEREZ-ALBUERNE: Let me start with the last topic, your Honor mentioned that you were interested in.

On the timing of it, not sure exactly what facet of that you'd like us to address, but in terms of -- if the question is, is this motion ripe given the fact that we've got the stay for depositions in this case for some period of time linked to the Ramos decision and that there are generally stays in other cases pending the 9th Circuit decision in Ramos. Do I have that right, your Honor? Is that what you'd --

THE COURT: Yes, and I suppose the other question is, it wasn't clear to me from the papers where the parties are in terms of discovery. Meaning, I know the government makes reference to productions of the DHS files. I wasn't sure if that is complete, substantially complete; is there a 30(b)(6)

deposition that you're contemplating from DHS, and if so, has that happened, is it scheduled to happen or is that part of what I've now stayed? So, counsel, just sort of overall where are you in that regard.

MR. PEREZ-ALBUERNE: In terms of where we are overall, the government has, in fact, produced documents from DHS' files responsive to our document request. I believe we don't have confirmation that's complete; I think it's not complete according to the government. I'm not sure we've got a date certain. I just don't know if we have a date certain yet about when that's going to be completed, but we don't have all the documents yet that they choose to produce.

And then with respect to -- relevant to the issue of privilege, we've had the government produce I believe it's only two small privilege logs that were actually generated for this case and those address items that would have been in the administrative record absent an asserted privilege. The government's also produced a series of privilege logs that came from the other litigations. First, we haven't had those designated as covering the production in this case, in fact, I think the government has warned us that there may be gaps in those logs versus the production. So we don't have a privilege log which we can look at and say this matches up with the production that we've made to you to date or this is our complete production.

Some of those privilege logs are also in draft form. Some of them seem like -- well, they're insufficient in the sense that there's one that has a slew of documents that are clearly dated long after these decisions were made and deliberative process privileges asserted for those documents. We think that's an error, just a clerical error, again, it's hard to tell.

In terms of depositions, we've noticed the 30(b)(6) deposition that's at issue in this motion to the White House. We haven't noticed other depositions yet. We've been in discussions with the government regarding individual depositions. We've talked specifically about individual depositions of lower-level administrative officers within DHS. There seems to be an ability or some initial agreement as to what that will look like. Again, with respect to White House personnel, the government has taken the position that they're not going to produce anyone in response to the 30(b)(6) or I think as individuals as well.

I think that's sort of the status of where we are right now.

Your Honor, the order that we submitted that you blessed was -- stayed all deposition discovery contingent on the Ramos injunction and what happens with the Ramos injunction in front of the 9th Circuit.

THE COURT: But other than the White House deposition

notice, there aren't any others that you've issued even if they would be stayed now.

MR. PEREZ-ALBUERNE: Exactly. Well, there are none that we've issued yet, we'll issue some when the stay is lifted.

THE COURT: Okay.

Thank you, counsel.

MR. PEREZ-ALBUERNE: You're welcome.

THE COURT: Why don't we move on to the substance, and if I think any more about the timing, questions I have as to the timing I'll come back to.

MR. PEREZ-ALBUERNE: Sure, your Honor.

Is there a particular area of the substance you'd like me to focus on?

THE COURT: Counsel, you can address both privilege and undue burden as you see fit.

MR. PEREZ-ALBUERNE: Let me begin, your Honor, by acknowledging that we recognize that this is not a typical discovery request in a civil litigation; that is, it is directed at senior members, the most senior members of the executive branch. So we acknowledge that's not a typical situation. But coincident to that, this is not an ordinary case. This is a case where, as your Honor held in your opinion on the motion to dismiss, we've made a *prima facie* showing that a decision made by the government which will deport hundreds of

thousands of individuals and impact hundreds of thousands of families was tainted by racial animus. And so while this is not a typical request, it's justified under these circumstances in the larger sense because this is not a typical case.

With respect to the dispute, again, what we're at loggerheads over is whether the government needs to search the files of the White House, produce non-privileged documents that are responsive, and produce a privilege log for ones they believe to be responsive. And likewise, whether they need to produce a 30(b)(6) witness in response to our subpoena.

And the government has categorically taken the position that they're not going to -- essentially, they're not going to allow any direct discovery on the White House.

The government has produced documents with the White House personnel on them, e-mail chains and things like that, that were found -- as I understand it, were found in the files of DHS, but they have not searched the files and have refused to search the files of the White House.

The basis for their -- as we understand it, the basis for their refusal to do so is a reading they have of the Supreme Court's case in Cheney, which they believe provides that they need not make any kind of particularized showing -- need not search and make a particularized showing that the presidential communication privilege applies in a case like ours.

We think that's incorrect, your Honor. We don't think that's what Cheney says. But the net of that is they refuse to even search for these documents or produce a privilege log.

So we've tried to negotiate with them a few times on this. The net of all that is there seems to be no appetite on their end for any discussion about a compromise when it comes to the White House. So we're before your Honor.

And what we're seeking here, just to be clear, is we're seeking an order that compels the government to search the White House files for responsive documents. If they withhold any on the basis of privilege to produce -- to produce a privilege log, an adequate privilege log, so we can -- we and the Court, if necessary -- can evaluate those claims of privilege for those specific documents, and then to produce a 30(b)(6) witness or witnesses on the topics we've designated, or to the extent they're going to object to those, give us some particularized objections to those 30(b)(6) topics, and we can discuss those.

On the substance of the privileges, your Honor, I guess I'll begin with the presidential communication privilege.

Let me make a caveat here by saying it's not clear to me whether the government is still joining the issue of the deliberative process privilege. It wasn't really briefed at all. I don't know if that's just the government has decided not to pursue that line of argument. As your Honor knows, the

brief is concentrated on the presidential communication privilege.

THE COURT: Okay. Why don't we start there.

MR. PEREZ-ALBUERNE: Excuse me?

THE COURT: We can start there, counsel.

MR. PEREZ-ALBUERNE: And so, your Honor, what the government says is that Cheney established some sort of standard in which there's a predicate showing that has to be made by the defendant before the government has to search for and make particularized objections to particular documents when the presidential communication privilege is in play. And we disagree with that reading of Cheney, but we also disagree that where the Cheney and the presidential communication privileges are even implicated by our requests, and that's an important threshold issue.

The decision at issue in this case is a decision that everyone, the government, we, all the parties, agree was made by the Acting Secretary or the Secretary of DHS. No one is alleging that that was a decision made by the President. And the presidential communication privilege applies only in instances when the decision being made is one that is being made by the President. It's there to protect the President's ability as a constitutional officer to get good advice and candid advice when a President makes decisions.

The remainder of the executives officers, when they

are making decisions, can, if appropriate, avail themselves of the deliberative process privilege, but they're not entitled to invoke the presidential -- I want to make a distinction here between invoking and applying -- they can't apply the presidential communication privilege to their independent decision making.

THE COURT: Counsel, was that a distinction, though, that the Court made in Cheney? Meaning, wasn't that discovery related to a decision -- meaning, was that related to presidential decision making in the way that you're defining it now?

MR. PEREZ-ALBUERNE: Yes, your Honor, it was. In that case, the issue was the plaintiffs sought to get, essentially, a bunch of open meeting disclosures with respect to a council the President assembled, chaired by the vice president, that was to advise the President on the subjects of energy policy. And so that was the purpose of the council. So it did directly implicate a presidential decision on policy and advice to the President.

THE COURT: But I guess, counsel, what I'm saying is does that as a matter of law, does the distinction you're making hold up under the analysis in Cheney, meaning would that have made a difference in your mind as to the ruling in Cheney?

MR. PEREZ-ALBUERNE: I certainly think it would have made a significant difference, because I think that the

privilege isn't even at issue in cases where you're talking about, for example, the Secretary of Department of Homeland Security making a decision. The appropriate -- if there is a protection for those deliberations, it's the deliberative process privilege.

THE COURT: Even if discovery you're seeking might reflect communications between the President and his advisers on positions he would take even if it was bearing upon the decision being made by the Secretary of the Department of Homeland Security?

MR. PEREZ-ALBUERNE: Yes, your Honor. Again, because the underpinnings which are constitutional of the presidential communication privilege are that the President needs to get candid advice from his advisers that's not subject to disclosure. It's about protecting the presidential decision making because of the President's unique position in the constitutional structure. It's not about protecting the decision making of other lesser officers of the executive.

THE COURT: But is the key whether or not it's decision making or is the key whether or not it's communication between the President and advisers about policy decisions?

MR. PEREZ-ALBUERNE: Your Honor, the key is that it's decision making by the President, because that's what the privilege is intended to protect and to enhance.

In the absence of that kind of limitation, your Honor,

then, you know, there could always be an argument that some lower-level executive officer's decision is somehow related to a presidential policy, and therefore, subject -- deliberations for that decision are subject to the presidential communication privilege. That's another failing and an opposite reading of that.

THE COURT: And so, counsel, what do you say to the government's argument which I recognize is based largely on Cheney that as a preliminary matter there should be a showing that you can't get this discovery from any other source?

MR. PEREZ-ALBUERNE: Well, I think, your Honor, that what -- I think they're wrong about the reading in Cheney. I think the issue in Cheney has to do with under the circumstances of that case, which are quite different from this case, whether there has to be some preliminary showing before the government's put through to even to go look for documents that might be responsive. Because, again, that's the government's position here. It's not about whether they have looked for documents or are asserting privilege over some documents and the fight is about those particular documents. Here it is they don't think that they should have even have to go look and assert the privilege specifically without some sort of preliminary showing.

And so, you know, our answer to that is, as I mentioned -- as we just discussed, first, Cheney is not

implicated, none of this is implicated because it's not the President making a decision here. And moreover, what Cheney stands for is the idea that in that kind of a case -- and let me make the distinction here -- Cheney is like the FOIA cases in that what the plaintiff in Cheney was trying to do was to enforce a statutory requirement of disclosure of the committee's deliberations and inputs. So there is no underlying cause of action for which there is a need for that discovery. It is disclosure for the sake of statutory disclosure, just like the FOIA cases. So in those instances -- and even the cases that's cited by the defendant here, Lardner in particular, talks about how there's a significant distinction with respect to this privilege when there is this kind of simple statutory requirement trying to be enforced versus some other more weighty purpose. And in the case of -- in some cases it's that it's a criminal prosecution, in other cases it's a civil-rights-based suit like this one.

But this is distinct in the sense that here what we're trying to do, there's an underlying cause of action, it's about racial animus in one of the very important decisions by the government and animus at the highest levels of the government. And in that situation the Court is, in the words I believe of several of the cases, back to performing one of its core functions here, which is to ensure that the government doesn't discriminate against individuals on the basis of race.

So it is not like the FOIA cases, it's not like Cheney, and that's context, your Honor.

Moreover, Cheney doesn't announce a test. Cheney reaches the conclusion it reaches in the context of the *mandamus* petition there and the Circuit Court's decision that they should just stop the analysis because *mandamus* is inappropriate because there's an alternative specific assertion of privilege. That's what the holding in the case is. To the extent that the burden falls into that or scope of the document requests fall into that, I think what the court is saying is that in the context of very broad document requests, the like of which were at issue there, document requests, your Honor, by the way, that the Court recognized would be more disclosure than is necessary under the statute they're trying to enforce for disclosure. So in that context, before the government has to go off and make a search and -- and some kind of privilege log, there needs to be some showing that -- there needs to be some showing that the claim has merit. So that's what we think Cheney stands for.

THE COURT: But what about the government's interpretation of Cheney that at least here there should be a showing that you can't get the discovery from any other source? And the reason I'm focused on this is, counsel, if it is the case that as things stand now you haven't gotten full production from DHS and there were some documents in the DHS

files that apparently reflected some communications with the White House, shouldn't I allow that discovery to play out, to see whether or not there's been a preliminary showing of need?

MR. PEREZ-ALBUERNE: Well, your Honor, I think a couple of responses to that.

We think that in the first instance there has been whatever preliminary showing of need is required, even if any of these tests apply, and that is, as your Honor has held, we've made a *prima facie* case of racial animus coming out of the White House that impacted the DHS decision to terminate the TPS status of the countries at issue in this case. And that, your Honor, is a sufficient showing as long as the requests are targeted and important issues in that -- with respect to those claims. And here they very much are, your Honor. They're targeted at what the -- what influence the White House had on the DHS decision and then, importantly, the basis for the White House's decision and to exert that influence.

And that gets me to the second point, which is, we need evidence, your Honor, not only that the White House influenced the decision of DHS, but that that influence was driven by unconstitutional racial bias. And the reason the White House decided to exert that influence, your Honor, is not going to be in the DHS files. That's going to be in the White House's files and in meetings that people at the White House had about how they're going to communicate with DHS. So it's

very unlikely the communications between the White House and DHS are going to expose the White House's internal rationale for exerting that influence, rationale which we have alleged plausibly is driven by racial animus. So that's a second issue, your Honor, here.

So, in essence, we can't get the discovery we need from other sources because by definition the discovery we need is in the hands of the White House, at least some of the discovery we need.

I want to make sure I answered your Honor's question.

THE COURT: You did.

MR. PEREZ-ALBUERNE: Thank you.

So, your Honor, again, preliminarily we don't think the privilege applies at all. To the extent your Honor disagrees with us and the privilege is at least theoretically applicable here, we think we've met the test for that -- for the privilege to be set aside. And that test, your Honor, is the test in In Re Sealed Case. You know, Cheney did not overrule that case, and as other courts have, Dairyland in particular, have held the test in In Re Sealed Case addresses the very concerns that the Supreme Court raised in Cheney. And so the test there being that we've shown that the stuff we're looking for, the documents and the testimony, is directly relevant to a central issue in the case in the first instance; and second of all, that that evidence isn't available from

other sources.

And so we just discussed why the evidence isn't available from other sources. But in terms of being central to the case, again, we've alleged racial animus on the part of White House personnel here in this case, plausibly alleged it in your Honor's words. Under those circumstances, that's a critical issue in the case. What thinking drove the White House to exert the influence it did to terminate these statuses is a critical part of this case for us to show animus. And so it couldn't get any more central. So we meet the test, even if it does apply, your Honor, and for the privilege to be set aside.

Again, there's a process that's been established in the cases for that, it is production of a privilege log. If we identify things we disagree with, your Honor can examine them in camera see if, in fact, they do meet the case law's criteria for disclosure; and if they do, they're disclosed, and if they don't, they're not. So there's a process for that. We think we have to start engaging in this process and the very first phase of that is that the government go search for documents, and if they're going to withhold anything, produce a privilege log.

And let me also make another comment about the sort of categorical refusal of the government, your Honor.

Their refusal has stretched to even documents that

are -- that we request which are facially not subject to the presidential communication privilege, and specifically we have a document request that asks for documents regarding communications between the White House and Congress with respect to the TPS program and TPS termination for these countries. The President's communications privilege applies to the executive branch, it doesn't apply to interbranch communications with Congress. And so that's an example of how we haven't even had them search for that in the White House files.

I don't know if your Honor needs anything else from me on the presidential communication privilege.

THE COURT: Well, I think to the extent that the government also presses an undue burden argument in regards to complying with these requests, what do you say to that, if anything, you want to add to your papers.

MR. PEREZ-ALBUERNE: Sure, your Honor.

First of all, if the government's allegations in this case are correct, that is, if the White House was not involved in the TPS decision-making process, then there shouldn't be very many documents responsive to our request. And so if they're correct, then I don't see where the burden comes from, the volume of documents should be quite small.

If, on the other hand, they're incorrect and, in fact, there is a large volume of documents, there are really two

responses: In the first instance, that's important, that means there are critical discussions which we should have discovery of about the government's influence and reason for that influence on the TPS termination decisions. And second of all, we are more than happy to work with the government if these kinds of searches turn up a huge number of documents to try to narrow them to reduce the burden on the government. But we can't even engage in that dialogue, your Honor, without the preliminary steps of searching for the documents and making the unprivileged productions.

THE COURT: Thank you.

MR. PEREZ-ALBUERNE: You're welcome.

THE COURT: Counsel?

MR. KIRSCHNER: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. KIRSCHNER: I'm happy to address any of the timing questions you had at the beginning, or I'm happy to go into the substance.

THE COURT: Counsel, why don't I have you go into the substance and we'll turn back to the timing.

MR. KIRSCHNER: Okay. Just, for example, there was an update by the 9th Circuit yesterday in the Ramos proceedings, and I'm happy to --

THE COURT: Oh, sure, you can give me that.

MR. KIRSCHNER: It's just that the 9th Circuit has

moved the calendar date for prudential oral argument. Before it was June, July or August, now it's August, September or October. So the 9th Circuit is not even going to hear the Ramos appeal until August at the earliest.

So, your Honor, the issue before you is not an issue of privilege. We have not waived the presidential communications privilege, we have not waived the deliberative process privilege. Cheney is not a question of privilege, it's a question of burden on the White House in the matter of civil discovery.

In its concurrence, Justice John Paul Stevens talked about the burden being on plaintiffs given the serious issues for seeking discovery on the White House. And the discussion in Cheney talks significantly about the significant burdens on the White House and how other options have to be fully explored before even entertaining the question of discovery on the White House.

The presidential -- just as an aside, the presidential communication privilege can come up in a whole host of ways once reviewing the materials. It could be that there could be discussion of potential legislation related to TPS that might be distinct from the decision to terminate but could be tied up in plaintiffs' request. My point of just using that one illustration is that there's no reason to believe that the presidential communications privilege wouldn't apply to the

plaintiffs' requests. In fact, the nature of their requests suggests directly that it would be implicated.

Same with the deliberative process privilege; they're asking for internal government deliberations. And in the In Re Grand Jury (Mr. S.) case that we cited in our briefs, the 1st Circuit said that questions of privilege are -- it's a fact intensive document-by-document question.

In the recently concluded trial in Saget, the judge reviewed thousands of documents in camera and only a handful of them did he overrule the deliberative -- he found -- he admitted not withstanding the deliberative process privilege that we asserted, with the suggestion that thousands of other documents he upheld the privilege.

So I just want to make that point very clear that we are not waiving the presidential communications privilege, nor are we waiving the deliberative process privilege.

Rather, the question in Cheney is the burden on the White House, and where privilege comes into play is that it automatically implicates these serious questions of privilege that raises serious separation of powers concerns.

Our position --

THE COURT: Counsel, doesn't the burden have to be weighed case by case here? What do you say to your brother's argument that given the government's position in this litigation so far that the White House was not the ultimate

decision maker, what is there that you point to to say that just by the nature of the request it's a burden, as opposed to giving the Court some sense of what scope of documents we're talking about?

MR. KIRSCHNER: Well, a couple of things, your Honor.

The majority decision in Cheney only looked at the nature of the requests. It said that requests on their face were asking for everything under the sky, and that's --

THE COURT: Counsel, I do have the document requests that the plaintiff -- first set of requests, 76-1, and I've had a chance to look at it. Counsel, I'm not going to go through them line by line. I should also say that I've gotten -- I have 76-5 in front of me, which is the responses. But many of these requests are limited to, for instance, a single meeting. Meaning, it doesn't hit me on its face that they're as broad as the requests in Cheney.

MR. KIRSCHNER: Well, I'm glad you mentioned that. I want to use request number 30 to just show that it really is everything under the sky.

THE COURT: Okay.

MR. KIRSCHNER: The only way to do this response, a review for request number 30, is to seek -- to do a search for everything related to TPS.

It talks about a meeting on November 3rd. This is important for two reasons, because I'm going to use this

meeting to illustrate how much material we have produced from DHS' files related to this meeting. It also shows that the nature of the request would require something like Cheney of everything under the sky.

It says that there was a proposal provided at this meeting. We have produced that recommendation from the National Security Council. They have that document. But notwithstanding that, the request asks for any and all communications concerning the proposal. The only way to do a review of that is to look at everything related to TPS in the White House and to review those materials line by line to see if it relates to a proposal to -- that was formulated for this meeting.

So that that request by its very nature, there's no -- the only way to do a review of this response to this request is to search for everything related to Temporary Protected Status at the White House with -- amongst the relevant custodians.

But this is also important to show that going back to Cheney about exploring other options. They have, plaintiffs have, a recommendation from the National Security Council. They have handwritten notes from the Acting Secretary of Homeland Security for that meeting. It's a principals committee meeting. A principals committee meeting is a meeting convened of senior White House officials and the relevant cabinet level officials. This is something that's been across

administrations, it's a system in place.

We have produced, it was over our objections, but we have produced to plaintiffs, because it was produced in the other litigation, handwritten notes from Acting Secretary Duke at that meeting. We've also produced an internal memorandum from Acting Secretary Duke that refers to recommendations from the White House, as well as other e-mail correspondence between Acting Secretary Duke and the Chief of Staff of the White House, John Kelly; other e-mail correspondence between Acting Secretary Duke and other senior White House officials; other senior DHS officials and White House officials. They have a robust record of material from DHS, from DHS' files. And going to your Honor's question about the White House not being involved, that's not what we've said in this case.

I'll point you to page 21 of our motion to dismiss the amended complaint. In that motion, this is from the beginning, just -- one second, your Honor --

THE COURT: Sure.

MR. KIRSCHNER: I want to get this language right.

(Pause.)

MR. KIRSCHNER: This is in consideration that Acting Secretary Duke rejected the recommendation by the White House of the decision to terminate Honduras. She decided not to terminate Honduras. Now, it was later terminated when it was up again by Secretary Nielsen, but Acting Secretary Duke

rejected the White House recommendation. So this goes to two things, one that is ultimately a decision by the Secretary, but it also goes to the fact that we have always acknowledged that any serious policy matter such as this one would involve, in any administration you would expect, the White House.

What we say here on page 21, Docket 25, Although it should be considered unremarkable that White House -- I'll start over.

Although it should be considered unremarkable that White House advisers would provide input to the Secretary of Homeland Security on a sensitive matter of this nature, Acting Secretary Duke chose not to terminate Honduran TPS at that time triggering an automatic six-month extension.

Well, my point of bringing this up, your Honor, is their claim in this case when it comes to the White House is that the White House exerted influence but it's really that they exerted undue influence on the Secretary in making her decisions, or the Acting Secretary. The best source for that information, to the extent it exists, would be within DHS' files.

We have turned over no -- we've turned over every stone at DHS --

THE COURT: I guess that leads me to one question which is your brother represented he wasn't sure that that production was complete from DHS. What is the status from your

standpoint?

MR. KIRSCHNER: So the status -- the short answer is we expect it to be complete in early May, but I want to give some more context to this.

Plaintiffs' counsel also made this representation that we've produced material from other cases. There's been six lawsuits related to TPS. We've been doing document review concurrent, and so we haven't really -- because -- we've provided them our search terms and so forth, and so to the extent that sometimes it might have a different case Bates stamp, that's not how we're doing the document review. The document review is that everything that's under the sun when it comes to DHS' files, that it can be considered by any of these cases we're reviewing those materials. And in fact, meet and confer has worked in this case. And many times we've expanded our search terms in light of conversations in this case. We've had at least one custodian, I believe, I know we did -- in other cases we added additional custodians upon meet and conferral. And so the review and responsiveness from DHS has been expansive.

THE COURT: I don't think -- I didn't hear your brother contesting that. I certainly didn't perceive that from the motion papers. I guess the question is to the extent -- and I know the government disagrees with my decision of letting the case proceed, including with the White House still being

part of the lawsuit -- I guess with the focus on the White House, what is -- what is the burden of identifying what the realm of documents are if I conclude that the requests themselves are not overbroad and are relevant to the claims that the plaintiffs are asserting? Meaning, I understood there was some reference to privilege logs, but am I correct that those don't apply to this case as to any White House production?

MR. KIRSCHNER: So we're objecting to the discovery on the White House, and that is because under Cheney the breadth of what is available in terms of DHS and the nature of this litigation, that plaintiffs have not come even close to meeting their burden.

They're asking for a 30(b)(6) deposition on a policy matter. I am not aware of a single type of that deposition. It just shows the breadth of what they're seeking. That request number 30 requires review on its face, just like Cheney, of everything related to this topic. And so it's by the very nature of these requests and the 30(b)(6) deposition --

THE COURT: Well, I understand the argument. I guess what I'm trying to get at is what is the harm in identifying what would actually be responsive?

MR. KIRSCHNER: Well, it's -- because to identify what is responsive requires in-depth review, talking to custodians

to figure out potential documents, taking from their time. It requires a line-by-line review to identify responsiveness.

What Cheney -- it -- it inherently requires privilege considerations, that's exactly what Cheney was objecting to, the Supreme Court was objecting that the D.C. Circuit ordered.

THE COURT: But subject to identifying what documents would be responsive, you wouldn't be waiving any privilege, which presumably would be recounted in a privilege log.

MR. KIRSCHNER: So if it's just the question of responsiveness, it still requires a substantial burden to pull these documents, to review these documents, and to identify the nature of these documents.

Again, I point you to the language in Cheney about this being everything under the sky, I believe is the language, and I really -- that request number 30 kind of shows their hand of what -- of the fact that that is written in a way that on first blush looks very discrete because it looks like it's about one meeting, but to actually identify responsive material requires -- there's no way -- I can't think of a way how you would set up a search that doesn't require an across-the-board search to respond to that request.

The other thing I want to bring up, your Honor, is the Batalla Vidal case. That was a case that concerned the rescission of DACA, the Deferred Action for Childhood Arrivals. And in that case the magistrate ordered discovery on the White

House, and the District Court, who ultimately enjoined the decision of DACA, cited Cheney and overruled the magistrate's order on the White House and limited it to the government agencies' files, and specifically cited Cheney for that proposition.

The 2nd Circuit in considering the discovery dispute also cited Cheney and agreed with the District Court. And it just shows that of a similar claim to the one at issue here, and the 2nd Circuit felt it was a bridge too far.

The other case I'd site to you is the Saget case. There have been two preliminary injunctions so far in this TPS litigation, Ramos and Saget. Neither of them ordered discovery on the White House. In Saget, plaintiffs served discovery on the White House, and we objected.

THE COURT: Is that the Washington case?

MR. KIRSCHNER: No, sorry. Saget is the Brooklyn, Eastern District of New York case that went to trial.

So in that case, the plaintiffs asked for discovery on the White House, and we objected, and in that case we moved for a protective order. And the case went to trial and prior to resting their case for trial, the plaintiffs asked for a ruling on the motion for discovery on the White House, and the judge said, No, you should rest your case, you know, I know that motion is pending but rest your case. It was a four-day bench trial. The judge had reserved actually ten days for trial, but

it was four days.

The judge just issued on April 11th -- in terms of a slip opinion, it was 145 pages, it's already available on West Law, I think it's 68 pages or something or 86 pages, I might have my numbers reversed, but substantial. It does not rule on the motion for protective order vis-a-vis White House discovery. But, notwithstanding that, the judge, in footnote 24 in the context of a different matter, said -- referred to the record as comprehensive in that case. And throughout the opinion it talks about the White House being -- the White House communications that were from DHS' files and enjoined the President in the preliminary injunction opinion that was quite extensive, doing all the things that plaintiffs are asking here without ordering discovery on the White House.

We think that the illustration of the Batalla Vidal case, the Saget, the Ramos case, and the direction of Cheney and the extensive materials that we have already produced and we are continuing to produce and review for plaintiffs meets the standard of Cheney of exploring other avenues and that is the avenue of the DHS files.

As Justice Stevens said in his concurrence and as is discussed at length in the majority opinion by Justice Kennedy, plaintiffs do not come close to meeting their burden for asking for what is unwieldy and in many cases seem unprecedented discovery on the White House that --

So, your Honor, I mean, again, this is a question of burden, it's not a question of privilege. The privilege that gets implicated is the fact the nature of their cases implicate core constitutional questions.

If I have a moment, I would like to discuss the question of timing, unless you have more on the substance.

THE COURT: No, I mean, I -- I don't know that I have another question in the sense that I understand how the parties' positions diverge on how I should read Cheney and the other cases. I understand your point about this recent case in New York, although I'm not sure that answers sort of the legal question that's before me. But I took at a minimum -- even if I weren't to adopt your ultimate position, the government's view is at a minimum I should wait for the DHS discovery to be complete.

MR. KIRSCHNER: Well, we think that we have already -- given how much we've already produced from DHS' files has already answered the question that plaintiffs can't meet the burden, that that -- I mean, to the extent that plaintiffs would have to show that there was something that was beyond what was in DHS' files -- again, plaintiffs' claim is there was improper influence on DHS. We've produced substantial materials, some we've claimed privilege on, but we've produced a lot of materials for which they have in unredacted form. I gave a few illustrations today. They in their own motion to

compel cite examples themselves, which were in addition to the ones that I cited.

I would also say the timing also matters. This is where the timing gets into the substance.

Every TPS termination that has been done in the last couple of years, I mean every administration has terminated TPS at some point, but I'm referring to just the terminations at issue here, are either enjoined or stayed, every single one of them, and that includes the three countries here.

The Ramos --

THE COURT: As I understand it, that's by agreement of the parties in light of Ramos is pending.

MR. KIRSCHNER: As entered by the Court.

THE COURT: As entered by the Court, okay.

MR. KIRSCHNER: So there's two cases that are of relevance, Ramos and Bhattarai, which is also in the Northern District of California.

So Ramos addressed Nicaragua, Sudan, El Salvador, and Haiti. So Haiti and El Salvador are at issue today.

There the judge entered the preliminary injunction, and in Saget, the preliminary injunction refers to Haiti as well. And that is briefed but it's not going to be argued until August at the earliest in the 9th Circuit. By agreement, the effective date of a termination could not go into effect prior to 120 days from issuance of the district mandate to the

District Court, which, given the local rules in the 9th Circuit, it would take about 52 days in the normal course for a mandate to issue from an adverse decision. That's assuming that the mandate doesn't even get stayed and also certainly doesn't assume plaintiffs don't prevail in the 9th Circuit. It's the earliest it can happen.

THE COURT: I understand.

MR. KIRSCHNER: Okay. So Bhattarai extends that to Honduras and Nepal. In Bhattarai we entered the agreement where we stayed that District Court litigation and tied the agreement in Ramos to Honduras and Nepal.

And so, again, we think that we should prevail on the merits of this motion, but where this gets into -- where the timing comes into play is what we said at the end of our motion is that we would ask that if there's any -- even if you granted in part plaintiffs' motion, we'd ask you to stay your order for consideration of our appellate options, which is expressly contemplated by Cheney, that's exactly what Cheney was doing, it was overruling the D.C.'s circuit denial of the dismissal of the writ of *mandamus*. That's also what's happened in a discovery dispute that you referred to in Washington that you referred to where the 9th Circuit stayed that order.

Again, we don't think it should come to that, but I just wanted to cover all of our bases today to make sure I addressed that point.

THE COURT: Thank you.

Counsel, I'll let you respond briefly.

MR. PEREZ-ALBUERNE: Sure, your Honor, thank you. A couple of points.

Let me begin with the government's arguments based on Saget and Ramos. A few points here to make.

This whole argument, as we understand it, it turns the entire analysis on its head. What they want your Honor to do is to create some new standard by which there is enough evidence for us to meet some kind of heightened need, but there's not too much evidence because then we don't need these additional documents. There's some sort of Goldilocks zone in there that every plaintiff has to land into. And what that means is that in a case like this, where we already have evidence there was influence from the White House, where we have some evidence that that influence was driven by, for example, non-statutory factors, which goes to our APA claim, that when we have some evidence of that, we're entitled to less discovery, not more discovery. And that turns the entire concept on its head. So it makes no sense, this argument.

And second of all, as a matter of fact, what happened in Saget was that the court, first of all, was making a decision on both -- both courts were making decisions on preliminary injunctions where the standard of proof is not the same as at trial; and second of all, the court in Saget, they

had submitted documents for in-camera review on a privilege log. It ended up citing some of those documents as the basis for its opinion. It proves that it's important for the court to be able to assess these claims of privilege on a document-by-document basis. So, if anything, it supports our position here.

And -- so that whole concept that somehow Saget and Ramos direct -- are guidance for the Court to give us less discovery makes no sense, your Honor.

With respect to the issue of timing, that was the last thing that counsel said. The problem, your Honor, is the government's made perfectly clear that they plan to appeal any adverse ruling with respect to this motion. And so depending when the court issues an opinion and how their appellate process is scheduled, we could easily envision a situation where we chew up all the time we have until there's a decision out of the 9th Circuit. And so leaving this to some later point in the case runs a real serious risk that we'll be in sort of the impossible position of having this issue pending and having to litigate the case on very short time frame either because we've agreed to it or because the terminations are going to occur.

So while it seems like there's a lot of time in this case before now and when some substantive action is going to happen, it's not all that much, especially if the Court has

some adverse -- some holding here adverse to the government. So I just want to make sure that that's clear when the Court's thinking about timing.

THE COURT: Counsel, the staying of the depositions was tied to Ramos as well?

MR. PEREZ-ALBUERNE: Yes, your Honor. But included in that agreement is an agreement that we will conclude the depositions within 45 days of when we have to crank up after Ramos. So what the parties have contemplated now is an accelerated path of discovery if the Ramos injunction is lifted. And so that's why we're concerned that if we don't use the time we have available now, that we'll be in an impossible position when it comes to finishing discovery in the case and trying the case.

THE COURT: Understood.

MR. PEREZ-ALBUERNE: Finally, your Honor, a point about the government's characterization of our claim. It's incorrect. So the government makes it seem like what we're claiming is the fact that the White House was involved in the DHS decision-making process is undue influence, or maybe the volume of it is undue or something like that. That is not what our claim is.

Your Honor was correct in interpreting our claim in respect to the motion to dismiss. The claim is that the influence the White House asserted was asserted because of an

improper motive, in the case of the constitutional claims because of the racial animus, in the case of one of the APA claims not because of the statutory enumerated factors which Congress has said is what should be considered when renewing TPS or not.

So, again, this litany of what they produced so far from DHS' files, I didn't hear anything in my brother's presentation which went to the issue of why was the White House seeking to have this outcome that they were trying to influence DHS to have? And that's a critical question in the case, and that's a question that can only be answered by at looking at what White House officials were doing and thinking at the time, not what they said to DHS.

THE COURT: Thank you.

Counsel, I appreciate the arguments on either side. I do want to consider not just the substance of the motions but the arguments about timing that were made and either side. I will do that and either give you my decision and/or further guidance on how to proceed.

Thank you, counsel.

MR. PEREZ-ALBUERNE: Thank you, your Honor.

THE CLERK: All rise.

(Court adjourned at 3:54 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Debra M. Joyce
Debra M. Joyce, RMR, CRR, FCRR
Official Court Reporter

May 1, 2019
Date